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SOVEREIGNTY OVER THE AIR

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BY

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THE subject to which I invite your attention to-day is one of complete novelty in International Law; but it is one that threatens to become of much importance whether in time of peace or in time of war: and that in the immediate future. We have just crossed the threshold of a new discovery and have learned for the first time that the air can be used in a practical way as a medium of transit from place to place on the surface of the earth. The means by which we can best utilize that knowledge commercially are not yet perfected: much remains to be done before we can transport passengers or goods with any degree of certainty or regularity; but from what has already been accomplished we have good reason to believe that the use of the air for commercial purposes is only a question of time. And for the purposes of war our knowledge is more advanced; for in war the use of air vessels has become an acknowledged fact. It has been demonstrated, not only by experiment, but by actual events, that air vessels are an effective force in belligerent operations both for the purpose of obtaining information and for the purpose of actual attack. Air vessels have been used in the war just ended between Italy and the Ottoman Porte, and in that which is unhappily now in progress, and we read in the daily journals of experiments which show that bombs can be dropped on targets of limited dimensions with a high degree of precision.

It is evident therefore that the time has come at which we must consider the principle on which the relations

of States are to be conducted with regard to air traffic, whether in peace or in war. Are Governments to have sovereignty over the space above their territories in the same way as they have sovereignty over the territories themselves? Are they to be able to regulate or forbid the user of that space as they will, subject only to such reciprocal obligations as they may bind themselves to perform by agreement? Or to take the opposite contention, is the air space to be free to all like the high seas: subject, at the most, to a control restricted to certain specified purposes and exercisable only within defined limits?

This is the fundamental problem which faces us to-day, and it is a problem which has never before presented itself in any direct way. It has lately been the subject of discussion by an International Conference which met at Paris at the instance of the French Government, but that Conference has adjourned without coming to any conclusion because it was found impossible to agree on this initial question of the right of States over the air space above their territories. Some Governments claimed full sovereignty: others contended that the air is free, subject to some limited control. And so the question remains in doubt. But it is one that cannot stand over indefinitely: it must be settled, and, if the mastery of the air progresses at the present rate, it must be settled soon. For these reasons I have thought it would be profitable to consider to-day the broad question of State Sovereignty and State rights over the air.

I hold the view that these rights are already fixed and determined by admitted principles of International Law, and that if Convention be necessary it is necessary only to give effect to those principles in the regulation of aerial traffic from State to State. If that be so the position is a simple one, for all States are bound by

the principles of International Law and all must comply with them. On the other hand, if this view is wrong and the matter is not covered by any existing principle, then new law must be made by agreement; but that position is one of greater difficulty because there is no power for a majority of States to bind a minority: it follows that no agreement can be effective which is not accepted by all the Great Powers, and that no general law can be made until the differences of opinion which at present exist are satisfactorily adjusted. The practical advantage of holding that the matter is governed by existing principle is therefore manifest, and I hope to persuade you that this is the right conclusion in law. I shall use the terms 'air space' and 'air' as convertible in speaking to you to-day. 'Air space' is now more usually adopted by jurists, but the difference between the two expressions is to my mind a mere question of terms and unimportant at that: the 'air' in popular language sufficiently denotes the space above our heads; 'air space' is a more cumbrous term but it has the merit of being more exact, because the question at issue is as to sovereignty over the space itself and not over the moving particles of air from time to time within it.

Now International Law is to be ascertained from usage, from Convention, and from those broad principles which have become accepted among Nations as the basis on which the law is to proceed. There is no usage with regard to the extent of sovereignty over air vessels; from the very facts of the case that is impossible: and there is as yet no Convention: but in my judgement the matter is covered, or, as I would rather say, is concluded, by a principle of International Law which is fundamental in the determination of the extent of State sovereignty and must apply as much to the air space above State Territory as to the territory itself.

This principle is that Sovereign States are entitled to all those rights which are necessary for the preservation and protection of their territories; and I shall presently submit to you that the right of absolute control over the air is essential for these purposes. This principle is admitted beyond challenge, and operates to give States rights in various ways. Amongst other things it is, as Rivier[1] has pointed out, the true reason of the law which gives to States the sovereignty over the belt of the high seas adjoining their coasts and over the bays and other indentations on their shores. It is manifest that a State for the purposes of self-protection must have jurisdiction over the waters adjoining its territories; for if those waters were part of the high seas the riparian State could not maintain any effective system of customs—ships are not tied down to roads or other defined tracks as vehicles are on land, they could hover along the coast, where they pleased, until a landing could be effected unobserved: the State could not enforce sanitary precautions, it could not effectively defend its shores: the operations of belligerents would be conducted upon its coastal waters to the constant danger of the inhabitants. For these reasons sovereignty over a belt of territorial waters, which has become generally accepted as of a width of three marine miles, has been given to riparian States. By custom there has become established a right of passage for the merchant vessels of all nations over this belt, but there are differences, to which I will presently refer, between the seas adjoining State territories and the air space above them which make it impossible that passage through the air space can ever be conceded as of right. For the same reason, too, States have been given sovereignty over the waters which indent their coasts; for it would be impossible

[1] I. 145.

for them to sufficiently protect themselves or to carry on their administration, if the bays and inlets which give entrance to their territories were to be treated as open to the fleets and ships of all nations. Indeed, if I may interpose the observation here, it is in the application of the principle that States have the right to sovereignty over such portions of the seas as it is necessary for their safety that they should control, that, in my judgement, there is to be found the true test of the particular bays and other enclosed waters which in the absence of convention or custom or acquiescence are by law within the sovereignty of riparian States; those waters which are so situated with regard to the State territories that the control of them is necessary for the preservation and administration of the State are territorial waters according to International Law; those which from their extent or situation cannot be reasonably regarded as necessary to the State for the purposes referred to, are by law open seas, subject of course to the same three-mile limit as the unindented coasts.

In regard to the air the necessity for giving to States the control of the space above their territories is even more urgent and more obvious than it is with regard to the waters which wash their shores. For there is between vessels traversing territorial waters and vessels traversing the air space above State territories, the great cardinal difference which is the result of the natural law of gravitation. The presence of merchant vessels on those waters is not of itself a danger to the State, but the presence of an air-ship above our heads is of itself a source of danger more or less immediate according to circumstance. If any accident occur to the machinery which enables an aeroplane to support itself in the air, and experience shows that this is not of infrequent occurrence, the aeroplane must descend on State

territory, and if it is disabled it becomes in its descent a source of danger to persons and property beneath. If anything is dropped from it there is the same danger. Moreover, an air vessel has means of access to the territory below it which cannot be regulated, even to the same extent as the approach of vessels to the shores. These are differences which make it even more necessary for States to have control of the space above their territories than of the waters which wash their shores. And if, apart from the analogy, we consider the relation in which the air is in regard to the earth beneath it, we are forced to the conclusion that so long as the law of gravity prevails, a State must have unfettered control over air vessels passing above its territories, in order to protect itself and to carry on its administration. Let me suggest to you a few cases in which the interests of the subjacent State are immediately concerned. For instance, there is the question of customs. If the air were free to all it would be impossible to enforce customs regulations or to control the arrival of persons whose entrance was prohibited by law: air vessels could sail at pleasure over the State territories, and would find ample opportunity of depositing their cargo or their passengers unobserved. We need not seriously entertain the suggestion which has found some support, that this difficulty will be met by aerial customs houses located in captive balloons, at which all air vessels would have to call; or by subjecting passing air vessels to inspection by officers in aeroplanes. Those are hardly practical solutions of the difficulty. Again, if the air were free, the defensive works and military dispositions of every State would be exposed to the view of any air vessel above it; they would be recorded by sketch or photograph, they would become common knowledge to the world. Again, in time of

war there would arise grave difficulties as to the rights of belligerents in the air space above Neutral States to which I will return at a later stage. These are reasons, and there are others which will occur to you, for the conclusion to which I ask you to come, that the control of the air is absolutely essential for the preservation of the subjacent State. Indeed, it is not too much to say that sovereignty over the land can never be made effective if the air be beyond the jurisdiction of the sovereign power. The bed-rock fact is that the user of the air cannot be treated as a thing distinct from the user of the territory beneath it; the two are inseparably connected, and can never be dissociated until the law of gravity ceases to have effect. If that be so it follows inevitably from the admitted principles of International Law that States are entitled to absolute sovereignty in the air space above their territories.

It is significant that this construction of the law is the only construction which is consistent with such usage in regard to jurisdiction over the air as there has yet been. There is, as has been said, no practice with regard to air-ships, but there is some practice with regard to other forms of user of the air, and that practice is material, because it shows that States have never contemplated the existence of any limits to their sovereignty. In nearly all civilized countries the claim of owners of land to the exclusive property in the air above them has been recognized by the State; it has been confirmed by legislation, by judicial utterances, and in other ways: and by that recognition States have themselves necessarily claimed sovereignty to a corresponding extent. And in other ways States have asserted and exercised jurisdiction over the air whenever it has seemed to them advisable to do so: for instance, laws have been commonly made with

regard to such matters as wireless telegraphy, shooting in the air, the descent of parachutists from balloons and the like; and our own Parliament in 1911 enacted the Aerial Navigation Act, which is a direct assertion of sovereignty over all air vessels, irrespective of altitudes. In fact, States have always exercised sovereignty over the air so far as they have wanted to do so; and these claims have never yet been challenged, nor has there ever, until now, been any suggestion made that sovereignty was more limited with regard to the air space above land than it is with regard to the land itself. If International Law recognized the principle that the air was not within the jurisdiction of the sovereignty of the earth, surely there would have been some protest, or at least some doubt expressed as to the validity of these assertions of sovereignty. But in the whole history of International Law there has never been any question raised in any single case, nor has any doubt ever been suggested as to the jurisdiction of States over the air until the present time. The practice of States therefore supports the view of sovereignty over the air, and is altogether incompatible with the claims to freedom of the air which are now put forward.

I referred a moment ago to the principles of municipal law, and though for our present purpose we have to consider the rights of nations, and to treat our subject from the point of view of sovereignty, and the jurisdiction of sovereigns, and not from that of ownership or property, it is useful to notice the law as to private ownership in the 'air' because the determination of the rights of States has been much influenced in the past by those principles of municipal law which are commonly accepted among civilized nations. And it is certain that the analogy to be drawn from municipal law on this question is in favour of complete sovereignty to

the uttermost point of the 'air space'. The principle expressed in the maxim 'cuius est solum, eius est usque ad cœlum' is part of the law of the great majority of civilized countries, and it, in terms, confers property in the whole air space above the land of the landowner. This principle is recognized in some passages in the *Digest*,[1] but in mediaeval times we find it accepted as a general principle of Roman Law, and it has never been questioned since. It was introduced into England at an early date, indeed, we are told that it had become a rule of the English Common Law as early as the reign of Edward I,[2] and it can claim the authority in turn of Coke[3] and of Blackstone,[4] and of many eminent Judges of later date. About one hundred years ago Lord Ellenborough[5] threw some doubts on the extent of it, and intimated an opinion that an aeronaut would not be liable to an action of trespass at the suit of the occupier of every field over which his balloon passed. But this opinion was what lawyers call an 'obiter dictum': it was an observation which did not arise out of the facts of the case before him and consequently had no judicial authority; and it has never been thought to be a correct statement of the law. Lord Blackburn[6] expressly dissented from the view taken by Lord Ellenborough, and modern authority is almost unanimous in holding that the man who has land has everything above it: that is, that he owns the column of air above 'usque ad cœlum'. This has been laid down time after time by modern Judges: among others, Lord Esher, Lord Bowen, Lord Justice Fry,[7]

[1] *Digest* viii. 2. 1. pr.; xliii. 24. 22. 4.
[2] Cro. Eliz. 118.
[3] Co. Litt. 4 *a*.
[4] Bl. 18.
[5] Pickering *v.* Rudd (1815), 1 Camp. 219, 220.
[6] Kenyon *v.* Hart (1865), 6 B. & S. 249, 252.
[7] Wandsworth Board of Works *v.* United Telephone Co. (1884), 13 Q. B. 904.

and Lord Collins[1] have all expressed their opinion to that effect in specific terms. For myself, I cannot doubt that an action for trespass will lie in our Courts against the owner of an aeroplane which has passed through the air above the plaintiff's land, though the damages recoverable would be nominal in the absence of any direct injury. The corresponding rule of law which gives ownership to the centre of the earth, has been held to cover mining at depths which were not dreamt of in earlier days, and I see no way in which any limit can be placed under the law of England, as it stands to-day, on the extent of the property of the landowner to air space above his soil: if those rights are to be cut down that must be done by legislation. And if we turn to the law of other countries we find the same rule has obtained general acceptance. It is embodied in the Code Napoléon,[2] in the codes of Germany,[3] Switzerland, Italy, the Netherlands, Belgium, Spain, Portugal, Austria, Japan, Turkey, and the U. S. of America.[4] This unanimity is remarkable, and it proves that the principle of State sovereignty over the whole air space has been generally recognized by civilized nations; for, of course, the recognition of the rights of individual proprietors 'usque ad cœlum' involves the assertion of State sovereignty to the same extent. It may be said that this municipal law is not a sufficient foundation for a Law of Nations, because the principle of ownership to the heavens

[1] Finchley Electric Light Co. *v.* Finchley Urban Council (1903), 1 Ch. 440.

[2] Art. 552.

[3] The German Code now in force imposes a restriction on the exercise of a landowner's right in regard to user of the air by which his interests are not affected. But it continues to recognize ownership of unlimited extent.

[4] I am indebted for this information to the learned work on Air Sovereignty of Dr. J. F. Lyclama à Nigeholt, The Hague, Martinus Nighoff, 1910.

became embodied in it in a much more limited connexion, and at a time when aerial traffic was not contemplated: the law concerned itself then with rights of passage over land and over water, but not with passage through the air, and rights in the air only came in question in so far as they were obstructed by trees or structures planted in the soil. That is so, no doubt. The fact is, of course, that the use of the air for transit did not become the concern of practical men until, in these past few years, dirigible air vessels were invented. Balloons there have been for over a century, but balloons which could not be directed, and could only drift before aerial currents were not a means of locomotion that was capable of general development. It is the production of dirigible air-ships and aeroplanes that has made it necessary to discuss these problems. But novel uses do not annul old principles, and in my judgement we are entitled to say of municipal law that it does recognize private ownership in the air 'usque ad cœlum', and that so far as it has been called upon to deal with that ownership it has given effect to it to the fullest extent that has been claimed. The analogy of municipal law is, therefore, as clearly in favour of State sovereignty over the air as we have shown the practice of States to be. And we may say of the municipal law, as of the practice of States, that it is wholly inconsistent with the theory that the air is free, and indeed that it is inconceivable that the existence, even, of any such idea, should have been known to those who framed or administered municipal law.

I have now outlined to you the reasons which support the conclusion that States have sovereignty over the air space above their territories: a conclusion which follows, as it seems to me, from the admitted principles of International Law and is in accordance with the practice of

States and the law of private ownership. Let us now turn to the opposite contention that the air is free; in other words, that States have not rights of sovereignty over air. This contention has been put forward as a proposition of law, but so far as my knowledge goes it rests on no legal basis whatever; it finds no support in any principle of International or municipal law, or in any practice of nations: the utmost that can be claimed for it seems to be that it follows the analogy of the freedom of the high seas. But that analogy is altogether false because the two cases are essentially different in fact. That the high seas are free has become established by the common consent of nations after much contrary usage; but that freedom ends, as has been shown, at three miles from the shore or at any other point at which it conflicts with the right of self-preservation of States. The difference between the air and the high sea is that freedom of the air conflicts not at some points only, but at every point with the interests of the State below, because there can be no user of the air which does not to some extent affect the security or the administration of that State; for the distance above the State at which flying machines may pass, makes no difference in the danger to the person below and can make no difference so long as the law of gravitation remains in force. The inhabitants of States do not live at the bottom of the ocean; and the action of vessels on the surface of the high seas can neither affect the administration of the State nor the safety of its subjects, and that difference alone puts the analogy of the high seas out of court. But test the claim to air freedom more closely and the unreality of it becomes even more apparent. If air be free, it follows that the air at any distance, however small, above the earth is outside the jurisdiction of any State. The motor on the road is

subject to the sovereign powers of the State, but the air vessel skimming the plain alongside is outside those powers altogether. The hydroplane at rest on territorial waters is within the jurisdiction; but the moment it rises, even if it be but an inch above the surface of the sea, it becomes free from State control. It is not necessary to multiply cases of this kind. The proposition that the air is free, if it be made without limitation, requires only to be stated to be condemned; and it is as certain as anything can be, that no State would ever submit to the conditions which would follow from its acceptance. We need not discuss it further.

But it is said that even if the claim to complete freedom of the air cannot be maintained, yet the air is or should be free subject to certain limitations and exceptions. I suggest to you that this is altogether impracticable. If it be once admitted that the whole air space is not free and that there must be sovereign control over it to some distance or for some purposes, then an insuperable difficulty at once arises as to the point at which that control is to stop, or as to the particular cases in which it may not be exercised. Moreover, this idea of limited control, like the theory of free air, cannot be made consistent, in present conditions, with the law of territorial sovereignty; for admittedly the subjacent State has sovereignty over every air vessel that comes to ground, and we know that the voyage of air vessels is limited in extent and is subject to the necessity of frequent landings. With all respect to those who entertain the opposite view, it seems idle to contend that the air is free in any sense or to any extent, if the air vessel cannot make prolonged flights without landing, and if on every landing it be subjected to the unfettered power of the subjacent State. That power may of course be limited by agreement, but for the moment we are dismissing the

legal position apart from agreement, and I say again, as I have said before, that it is impossible to draw a distinction for these purposes between earth and air. I will deal with some of these matters more fully when we come to the discussions which have taken place on the Continent; and will only ask you at this point to notice that the theory of a limited control lends considerable support to the view I have presented to you, because it is of itself an admission that States must have some sovereignty or control amounting to sovereignty, for the purposes of their own protection. Those who advocate the view of limited control abandon the theory that the air is altogether free, and admit that user of the air must be subject to the prior rights of States to impose restrictions for their own security. They attempt, however, to limit the exercise of State rights in a manner which, as I hope to show you, is impossible in practice.

Another suggestion has been made, and with some authority, that sovereignty in the air should be recognized, but that it should be subject to a right of innocent passage. This can be no more than a suggestion for a settlement by Convention, for it is founded on no existing rule of law: the fact that passage through territorial waters has been gradually acquired by usage does not give a right to a passage through the air as to which there has been no usage. The recognition of a right of passage seems certain to provoke endless difficulties as to the extent of control exercisable over passing air vessels; and for these and other reasons it does not seem probable that this solution will be agreed to.

In so far as the object of those who advocate free air or free passage is to secure liberty of communication, we must all be in hearty sympathy with it, but it is not at all necessary for that object to invent new rules, and certainly not to invent rules which are certain to lead to

disputes and difficulties in practice. The admission of full sovereignty in the air space is not inconsistent with the freedom of aerial communication within all reasonable limits, for the liberty of passage, subject to proper control, is certain to be granted as a matter of reciprocity. In the absence of any treaty to the contrary, it is open to States to forbid the passage of foreigners by land or their entrance by water, but except in certain cases in which States have imposed prohibitions for reasons of policy, such, for instance, as the prohibition of the entry of particular classes of Orientals, no difficulty arises: the liberty of passage over State territory is not impeded by the exercise of sovereign rights in those territories; and no one can doubt that in the same way sufficient liberty of passage would be accorded to foreign air vessels. It seems proper to add here that so far as our knowledge goes it is quite practicable for States to control airships passing over their territories: the frontiers can be sufficiently demarcated for the purposes of aeronauts; air vessels can be compelled to show distinctive numbers, and marks visible from below: and though a State may not be able to arrest every offender at the moment for every breach of State law, some later occasion is sure to come when that can be done, or redress may be obtained by agreement through the State to which the air vessel belongs.

The broad principle of full sovereignty over the air has not, however, met with acceptance from the majority of the jurists who have taken part in the deliberations on the subject in recent years. Indeed, the weight of authority seems to be in favour of the theory of air freedom subject to some limitations, and for that reason I must now refer you to the occasions on which the subject has been discussed and to the results of these discussions.

It was in the year 1902 that attention was first directed to the subject, and in that year M. Fauchille, the well-known French publicist, submitted to the Institute of International Law at their Brussels Conference, a draft code of the laws to regulate aerial navigation both in peace and war; and this code, as amended from time to time, has served as the basis of subsequent debate, and was presented to the International Conference for that purpose by the Institute of International Law. M. Fauchille has done service of value, if I may be permitted to say so, by framing this code, because it raises in concrete form the practical questions that have to be determined. It may be thought by some to be premature at the present time to consider one or two of the provisions which find place in it: for instance, the powers of police in balloons may well stand over till our constabulary are more experienced in the pursuit of fugitives in the air; or, again, the nationality of babies born in aeroplanes, which is dealt with in another article of the draft, is not a topic which calls for instant settlement. This last matter is, in any case, one rather for the Reader in Private International Law than for the occupant of this Chair; it is no doubt receiving from my learned colleague the attention it deserves, and I would only suggest for his consideration that the law which is to govern promises of marriage made in balloons, or the form of solemnization of matrimony to be observed in monoplanes, would seem to require an even earlier settlement. But these are small criticisms; the draft has served good purpose in provoking a discussion of the general principles which should regulate aerial traffic.

As to sovereignty or non-sovereignty over the air the provisions are of the first importance, not only because they represent the opinion of M. Fauchille, who speaks with added authority on this particular subject from the

great attention he has bestowed on it; but also because in an amended form they have lately received the assent of the Institute of International Law. The effect of them, as originally drafted, was to recognize the principle of freedom of the air, but to declare that it was subject to control by the subjacent State for such purposes as were necessary to its security, and these were specified to be the repression of espionage, the enforcement of customs, and sanitary regulations, and necessary defence; and to enable it to enforce this control each State was to have power of prohibiting aerial navigation in a zone stretching from the earth to the height of 1,500 metres. The idea of a zone has attracted some jurists because in theory it is based on the possibility of effective occupation. The extent of territorial waters was at one time supposed to be measured by the range of cannon; that is by the possibility of effective occupation from the coast; but any limit of that kind was soon found to be impracticable, since it would vary from year to year according to the increased range of artillery, and would by this time have come to confer sovereignty over an extent of waters which would be altogether unreasonable for any purpose of State protection; and in lieu of it the three-mile distance became generally accepted as a conventional limit sufficient for that purpose. The same objection would apply to any aerial zone measured by the possibility of control by cannon; indeed, for the present, the range of guns constructed to shoot into the air is so great as compared with the altitude at which aeroplanes can ordinarily travel, that any zone limitation on that basis would be valueless. The suggestion of a protected zone has now been abandoned by M. Fauchille as impracticable, and I need only add with all respect that it seems impossible to draw any real distinction between different zones of air space;

since, as has already been observed, the danger to the State below is not in any way diminished by the altitude at which air vessels pass above it; on the contrary, in one respect, the danger is greater since the higher the air vessel the greater the force with which any objects detached or thrown from it strike the earth. Apart from this objection, there is the further one that no two persons have ever yet been able to agree as to the extent of the zone to be prescribed.

No conclusions were arrived at in the discussions which ensued on the publication of this draft code, but the subject was brought into prominence in 1910 by the International Conference at Paris. The deliberations of the delegates were prolonged over several months, but were adjourned without result. There is a radical difference of opinion on the question of which I have been speaking, that is, whether there is to be State sovereignty or freedom of air subject to control in certain limited and specified ways. The Great Powers hold different views, and the difference so far appears to be irreconcilable.

In 1911 the matter was again brought forward at the meeting of the Institute of International Law at Madrid, and by a majority the principle of the freedom of the air was adopted, 'subject', I quote the words of the article, 'to the rights of subjacent States to regulate aerial traffic in the interests of their own security and that of their inhabitants and their property.' This was the decision of a majority, but there was a substantial number of members in opposition to it, and among them my eminent predecessor in this Chair, Professor Holland. In these circumstances we are the more free to criticize, and, with great respect to those who voted with the majority, I entertain the gravest doubt whether the solution which found favour with them at the time can

prove satisfactory either on legal principles or in practice. I have stated that there is no real authority for the proposition that the air is free, and that the declaration of the Institute cannot therefore be rested on any existing principle of International Law; but, as a suggestion for a settlement by agreement, it is open to the objection that it settles nothing, because the extent of the control that is reserved to the subjacent State is not defined with any sufficient exactness. It might be said of all laws to regulate aerial traffic that they were passed 'in the interests of the security of the State or that of their inhabitants and their property', and though some limitation on the State power is apparently intended, there is no indication of what that limitation is to be. General phrases of this kind read well enough on paper, but their precise meaning must be made clear before they can be accepted as a practical solution; for if that be not done questions will always arise as to the validity of the regulations made in each case. It seems certain that if any form of reservation such as that incorporated in the Madrid clause were to be adopted, there would result an unending series of disputes as to the particular legislation passed by each State; that legislation would be binding on the subjects of other Powers only if necessary for the security of the State which passed it, and that necessity would be subject to challenge in each case. This is a formidable difficulty of a practical kind, and I doubt whether it is possible to frame any clause with sufficient exactness to avoid it. But I go further and submit to you that no limited measure of control can enable States to adequately protect their territories; for the physical relations of the air to the earth beneath it are such that any user of the air space for aerial traffic must necessarily affect the interests of the State and its inhabitants. If that be so, there can be no 'right' to

pass through the air; for the so-called right must be subject to the legislation of the subjacent State without limit, and an easement enjoyed at the pleasure of a third party is not a 'right', it is a mere liberty. It is far better from every point of view to admit that States have full sovereignty over their air spaces, and to trust to the desire for reciprocity and the general comity of nations to ensure sufficient facilities for aerial traffic.

So far we have had in mind the general user of the air, but there are special considerations in regard to the user in time of war, and these demand separate consideration. We may put aside to-day the questions which have arisen, and must arise, as to the restrictions, if any, to be imposed on the use of air vessels in war. You will remember the Declaration of the Hague of 1899 prohibiting the discharge of projectiles from balloons or by any similar means, but that was in force for five years only, and with the exception of Great Britain and Austria-Hungary, all the greater military powers have declined to renew it. A proposal has been made to go further and to prohibit altogether the use of air vessels in war, and the proposal is one that must commend itself to all humane men. War is a ghastly business enough on land and sea, but at least we know the horrors of it. War in the air opens up unmeasured possibilities of destruction of life and property, and must lead to developments of which we cannot in the least foresee the results. In the interests of civilization it is right to ask nations to pause and think before they commit themselves to the use of so terrible a weapon; but it is to be feared that such an appeal will be in vain. The employment of air vessels may well alter the balance of forces; it may lessen the value of fleets and reduce the advantage which is held under present conditions by those who have command

of the seas; and nations who would gain by changes of that kind are not likely to forgo the advantages which these new forms of warfare would gain for them. But all these questions are beside our present purpose: we can deal only with the conditions that exist, and are concerned with the right to use the air space for hostilities, and not with the kind of hostilities that may be permitted.

Now if the theory of absolute sovereignty over the air space be accepted, then there are no difficulties to be solved; the air space above the State territory is in that view as much part of the State as the territory itself, and must be subjected to the rules which regulate the locality of belligerent operations on land or territorial waters. But if the contrary view prevail and traffic through the air be held free to all, there are further questions of much importance to be determined. The air space will then be in the same position as the high seas, it will be open for the hostilities of belligerents or for the passage of their troops, and that even over the territory of neutral States. There can be, of course, no question as to the right to fight or to pass over the territory of belligerent States: that right exists whether there be sovereignty in the air space or not, for the air space could be in no better position than the belligerent territory itself. But there is a difference as to the use of the air space over neutral States. If the air be free the neutral States have in law no right to hinder the operations of belligerents above their territories, for they have no dominion over the air space. That is the only conclusion to which the theory of free air can lead us, but the difficulty in the way of it is, that in fact the subjacent States cannot possibly afford to be indifferent to the events which are happening above them. Every aerial con-

flict that is conducted above the territory of a neutral State must be a danger, and not infrequently a very great danger, to the inhabitants of that State and to their property; every air vessel that is damaged must fall on the territory below; every missile that is fired must find a billet in the earth. Therefore, whatever lawyers may say, it is certain that no State will ever tolerate such a position if it can possibly help itself. Again, as to the passage of belligerent forces. If there be sovereignty in the air, it follows that belligerents cannot pass over the territories of neutral States through the air, any more than they can pass by land. But if the air be free, it follows equally that it is open to the passage of all forces, just as the high seas are open to the ships of all belligerents. One consequence must be that the political frontiers of the world will disappear; the existence of an intervening neutral State will no longer be a barrier to attack, and the territories of every nation will be exposed on every side to the invasion of any enemy. A change of this kind cannot be lightly accepted; it will increase the necessary burden of land defence to an intolerable degree and, by doing away with the protection which is at present afforded by intervening belts of neutral territory, it will remove one of the securities which make for peace among Continental nations and will facilitate the operations of war. Any such result would be contrary to the whole object and tendency of the Law of Nations, but it is the result which must follow if the freedom of the air is to be accepted as a canon of law. It would, of course, be possible to enact, even in a Convention which recognized the freedom of the air, that the air space above neutral States should not be used for the passage of belligerent forces; and this has been proposed. But if that part of the Convention were not to be an idle form, it would follow that neutral States were bound to take

measures to stop the movements of belligerents in the air space over their territories so far as that were reasonably possible, although the air space was not within their sovereignty. The obligation to prevent belligerents from using neutral territory is well recognized: it is an obligation imposed by law on all neutral States and extends so far as the sovereignty of those States extends. But International Law has never yet imposed upon a State the obligation of preventing belligerent action outside its dominions: it can have no duty where it has no power in the nature of sovereignty; and it seems an impossible proposition that there should be imposed a duty on States to take action of this kind in the air space above them, if their sovereignty in that air space be denied. But if there be no obligation on States to do this, then it is not the slightest use to create such a restriction on paper. The conclusion is, as I submit to you, that it is altogether impossible to reconcile this theory of the freedom of the air, whether it be absolute freedom or whether it be freedom subject to control, with the actual facts of International practice or with the existing principles of International Law.

I have now dealt with the general considerations which arise in regard to aerial traffic and the rights of the subjacent States, and I trust that I have convinced you that, whether the matter be treated as one of legal principle or as one of practice, it is alike necessary to recognize the absolute sovereignty of States in the air space above their territories.

Let me sum up the argument which I have had the honour to present to you to-day. And first as to the theory that the air is free. That theory is new; it has never been accepted as a principle of International Law, and it would appear on the present occasion to be put forward rather as an expression of a generous hope than

as a statement of any rule which can be derived from existing law. It finds no support in any analogy which can be drawn from the Law of Nations or in any juridical principle which has as yet been recognized among States. We have seen that the suggested analogies of the high seas or of territorial waters have no bearing on the question of the air above State territories, and can never have any bearing on it because of the distinctions which exist between air and sea in their relation to the earth. We have seen that the practice of States is wholly opposed to the existence of any such idea, and that municipal law recognizes private ownership in the air to the fullest extent. Next, if the claim to air freedom be judged merely as a rule of convenience put forward for the acceptance of nations on a point which is not covered by existing law or principle, it must equally fail because it is not practicable. The discussions to which reference has been made have shown that such a rule is admittedly impossible if applied in its entirety, and those who advocate it have been forced to concede that it can stand only subject to wide restrictions and reservations imposed for the security of subjacent States. It must be restricted, they say, by the rights of the States below to legislate for their security, but they have not attempted to define with any approach to exactness the limits to which that legislation is to be subjected; and it does not seem possible that any definition can ever be successfully framed that will work in practice. States must be the judges of the necessity of the safeguards they impose for their protection; there can be no hope of peace if other States are to have the right to challenge their decision on such a point. Moreover, in time of war any right or so-called right of free navigation of the air must be subjected to the same rules which give protection to neutral territory, and the Sovereign of the neutral State must

be treated as Sovereign or the air above it in all that concerns the operations of belligerents. And this is inconsistent withany idea of the freedom of the air. If we turn, on the other hand, to the principle of State sovereignty over the air we find that it requires no Convention to make it effective, but that it is the natural outcome of existing International Law. It requires no reservations or restrictions ; it is simple in theory ; it can present no difficulties in practice ; it will not prevent the development of air transit any more than sovereignty of the earth has prevented the development of land transit. It is a result which follows inevitably from the admitted right of States to exercise sovereign powers to such extent as is necessary for the preservation and security of their territories, and as long as by the force of its attraction the earth holds in its bonds the vessels which pass through the air above it, so long that air, or the space which it occupies, must be treated as an inseparable part of the territories beneath. I ask you to agree with me that the principle of State sovereignty over the air is the only basis on which International Law can safely rest.

NOTE.

Since writing this lecture I have been informed that the same view of the law is advocated by the eminent German jurist, Professor Ernest Zitelmann, in an essay entitled ' Luftschiffahrtsrecht ' (Leipzig, 1910), and supported by the same sort of argument. The fact that we have arrived quite independently at the same conclusion by similar reasoning is, I venture to think, in favour of the view which we both advocate.

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